In The

Supreme Court of the United States

October Term, 1966

No. 847

WILLIAM RAY CORBEAN (a minor), by WILLIAM CHARLES CORBEAN, his father and next friend,
Petitioner,

vs.

XENIA CITY BOARD OF EDUCATION,
Respondent.

PETITIONER'S REPLY BRIEF

Pursuant to Rule 24(4) the petitioner herewith presents his Reply Brief.

At the very outset on page 1 of the Brief of the respondent it will be noted that it makes a change in the first question presented by including Title 42 U.S.C., Section 1983, known as Civil Action for Deprivation of Rights Act. Granted that the respondent has a right to change questions involved, yet in doing so he improvises an argument in this case which is wholly irrelevant. On page 8 of the Petition it is asserted that, ". . . The instant case is brought under Title 28 U.S.C. 1343(3), and the Ohio

constitutional authorization for present action, and legislative enactment that municipalities 'may sue and be sued'." This action does not present the problem in the use of the word "person" involved in Title 42 U.S.C., Section 1983, and the argument on page 3 of the Brief of respondent is specious and wholly irrelevant.

It will be noted also that the Respondent omits any reference of opposition to the first and second questions of the Petition of any right, privilege or immunity secured by the Fourteenth Amendment to the Constitution of the United States or by any Act of Congress. Again, while the respondent has a right to change the questions involved, and also to leave out any question, yet in doing so where even the argument in response to the Petition does not rebut the existence of a federal right secured by the Fourteenth Amendment to the Constitution of the United States or by any Act of Congress, which is very essential in this case, in all probability the respondent has waived opposition to the existence of such an important question of the federal rights involved.

The quotation of Title 42 U.S.C. 1983 at the top of page 3 of the respondent's Brief is not applicable in this case, and the first two paragraphs of page 3 relative to the application of the word "person" is not applicable, and such was pointed out on page 8 of the Petition for Writ of Certiorari. On page 4 of the respondent's Brief a position is taken that while constitutional safeguards are recognized, yet the states by adhering to the immunity doctrine are protected in "applying the law indiscriminately to all citizens." The position taken by this Court repeatedly is that when the state law infringes a constitutional right

embraced in the Fourteenth Amendment, that such law is unconstitutional irrespective of the doctrine in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, and irrespective of indiscriminate application. Since the respondent does not argue against the federal rights and immunities raised in the Petition, and wholly ignores the second question presented relative to "right, privilege or immunity", then it must be assumed that there is probably a waiver of the existence to such rights.

On page 5 of the Brief of the respondent, the position is taken that Article I, Section 16 of the Constitution of Ohio is not self-executing in the absence of an enabling legislation. In answer to this the petitioner holds that the State of Ohio has let down the bars for suits against a municipality by Section 715.05 of Ohio Revised Code in which it is provided that each municipality may "sue and be sued . . .". Furthermore, since the respondent has relied upon Ohio Revised Code, Section 3313.17 which holds that each school district is "a body politic and corporate, and, as such capable of suing and being sued", that the petitioner accepts such position as applicable to the respondent as letting down the bars and giving consent for the present action, irrespective of what the Courts of Ohio have said in the matter, and especially when federal rights and immunities have been violated. In *Law of Torts* by William L. Prosser (3rd Ed., 1964), page 1002-1003 is found the following language:

> "The immunity has been extended also to various state agencies, such as prisons, hospitals, educational institutions, state fairs, highway authorities, and commissions for public works. There is, however, a decided

> tendency to find a legislative intent in creating the agency, that it shall be subject to liability; and this is quite common in the latter cases, in many of which a provision that the agency can sue and be sued has been held sufficient to indicate it."

Not only does governmental immunity raise a federal question, but in exercising this governmental immunity the rights of the petitioner herein as invisioned by the Fourteenth Amendment have been violated. The case of *Cuiksa v. City of Mansfield*, 250 Fed. 2d 700 does not have application in the instant case, because in the Cuiksa Case the judges of municipal courts were acting under color of the statute or ordinance, and even in that case the Supreme Court of the United States did not give its opinion, and is not determinative of the questions presented by the petitioner. Even if the Cuiksa Case is some authority to the contrary, yet the United States Circuit Court of Appeals for the Third and Ninth Circuits are directly in conflict.

Right here lies a vulnerable defect in respondent's Brief. At no place in respondent's Brief is there any answer or any explanation to the conflict that exists between the opinion of the Sixth Circuit and the four opinions of the Third and Ninth Circuits, as specified on pages 6 and 7 of petitioner's Brief. May we not rely upon the statement, therefore, found in *Supreme Court Practice* by Stern and Gressman (3rd Ed., 1962) 265 wherein it is asserted,

> "Where there is a clear conflict of decisions, or where the question is undoubtedly of such importance as to need a Supreme Court determination, the respondent may have no reasonable basis for opposing certiorari."

It will be noted that the respondent takes his own avenue to present its Brief, but in doing so leaves the reasons for granting the Writ as presented in petitioner's Brief for the most part unanswered, and, therefore, runs contrary to the usual response. Also, in *Supreme Court Practice, supra*, page 264, it is asserted,

> "The Argument in the brief in opposition should answer the arguments contained in the Reasons for Granting the Writ in the petition."

CONCLUSION

For the reasons asserted in petitioner's Petition, Supplement and this Reply Brief, the Writ for Certiorari should issue by this Court.

Respectfully submitted,

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